APPEAL NO. 92140

On March 4, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. (Hearing officer) determined that the claimant had given notice to his employer of an on-the-job injury within 30 days after he knew or should have known that he had an on-the-job injury. The hearing officer determined that the respondent had pulled his back on or about (date of injury), while clearing rocks in the course and scope of his employment with (employer). The hearing officer further found that the earliest date on which the respondent knew or should have known that he had an injury which was job-related was July 3, 1991, and that he had given notice to his employer of that injury on August 1, 1991.

The appellant asks that the decision be reviewed and reversed. Specifically, the appellant complains of five Findings of Fact, and two Conclusions of Law, and complains: 1) that the decision lacks a discussion showing the reasoning of the hearing officer; 2) that a June 18th record of a magnetic resonance imaging (MRI) exam was not included in the decision as a carrier exhibit although admitted; 3) that it is inappropriate for the decision to say that respondent pulled his back "on or about" (date of injury); 4) that the medical evidence indicates that respondent knew he had a back injury on June 18th, which is more than 30 days before August 1, 1991, and, 5) that there is insufficient credible evidence to support the decision of the hearing officer. No response to the appeal was filed.

DECISION

After reviewing the record, we reverse the determination of the hearing officer that the respondent gave timely notice of the injury, and remand the case for further consideration, and for development of the evidence if deemed necessary or appropriate, on whether the good cause exception to untimely notice applies.

Whether or not an injury occurred in the course and scope of employment was not in dispute, and the sole issue for the hearing officer to decide was whether the respondent had given timely notice of his injury to his employer. For purposes of this appeal, we shall outline only those facts pertinent to the notice issue.

Respondent took off work June 18, 1991, to see a doctor after several weeks of pain in his legs and calves. He testified that he saw Dr. R, his family doctor, had x-rays of his legs taken, and was then sent to (hospital) for x-rays. X-rays of his back, taken June 18th, were normal. However, an MRI exam conducted July 3rd revealed herniated discs. The respondent discussed these tests and his condition on July 24th with Dr. S, who asked him about his job and prescribed physical therapy.

Respondent said that he recalled an incident, about six weeks before he took off from work, when he lifted rocks out of a ditch and pulled his back. Respondent stated that this incident occurred, to the best of his recollection, on or around (date of injury). At the time, he thought he had pulled a muscle. Soreness in his back lasted about a week and

a half and then went away; however, this was followed by leg pain which grew progressively worse, to the point where he could not sit down for prolonged periods. Respondent testified that July 24, 1991, was the first date that he realized that his leg pain was linked to a back injury, and that his back injury was linked to the rock lifting incident.

The respondent and witnesses for the appellant agreed that he first reported an on-the-job injury on August 1, 1991. Respondent and Ms. D, the contract administrator for the employer, stated that she assisted respondent with recollection of the specific date of (date of injury). One witness, Ms. C, said that when respondent had called the employer on June 18th to report his absence from work, he told her he had injured his back at home. Respondent could not recall saying this. His immediate supervisor, Mr. G, said that respondent complained of leg pain related to an old football injury. Respondent agreed that this had been his first theory about why he was having leg pains because the pain he suffered initially occurred around his previously injured knee.

Although the record reflects some testimony that respondent lifted rocks for the employer on a recurring basis from January 1991 through his absence in June 1991, the claim was not actively argued or presented by respondent as an occupational disease claim and there is no medical evidence indicating that the injury occurred through repetitive motion. Medical records indicate that Dr. S formulated an opinion on September 17, 1991, that respondent will need surgery. Respondent stated that, prior to (date of injury), he was in good health and had not injured his back.

Respondent did not contend, in his case in chief, that he gave notice 30 days after the injury. Although the words "good cause" were not used as such, the thrust of respondent's argument was that he did not know that he had incurred a serious physical impairment because of an incident he regarded as trivial, and that his late notice should therefore be excused.

As to the appellant's concern that the hearing officer's decision does not contain a discussion, we would note that this is not error. The 1989 Act, Art. 8308-6.34(g), requires only that a decision include findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. As to the appellant's contention that a June 18th medical report was omitted from the record, we note that it was admitted as one of respondent's exhibits; therefore, it was before the trier of fact as part of the record, to be weighed along with other evidence. Finally, we note that the determination that an incident occurred "on or about" (date of injury), reflects the testimony and is not defective to the adjudication of the notice issue.

We find that the hearing officer's determination that notice was timely given is erroneous because it was derived through misapplication of the notice requirements set forth in the law. The Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. Art. 8308-5.01(a) (Vernon's Supp. 1992), requires an employee to notify an employer within 30 days after the date on which an injury occurs. This section further

indicates that whether an employee "knew or should have known" that an injury is related to the employment is a factor in notice only if the injury is an occupational disease. *See also* Art. 8308-4.14 [relating to date of injury for an occupational disease]. The hearing officer did not find that respondent suffered an occupational disease, however, but determined that he incurred his injury when he lifted rocks on (date of injury). Consequently, the decision of the hearing officer is erroneous to the extent that he applied the statutory notice requirement for notifying an employer of an occupational disease to a claim involving an injury occurring as a result of a discreet incident.

However, from the evidence in the record, it appears that the hearing officer could have determined that "good cause" existed for failure to give notice to the employer in a timely manner. Art. 8308-5.02. A finding of "good cause" depends upon whether the evidence indicates that a party acted with the degree of diligence which an ordinarily prudent person would have exercised in the same or similar circumstances. *See* Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). An evaluation of good cause for failure to notify the employer of an injury can take into account whether or not an employee appreciates that he has incurred an "injury," as that term is defined in the 1989 Act.[1] The belief that pain or soreness is trivial, with no medical opinion to the contrary, can be found by the trier of fact to constitute good cause for failure to timely notify the employer. Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1981, no writ); Texas Workers' Compensation Commission Appeal No. 91030 (Docket No. AM-00020-91-CC-1) decided October 30, 1991. The hearing officer's Findings of Fact No. 8 and 9 appear to contain the necessary factual basis upon which he could have based a determination that the respondent had good cause for failure to timely report his injury:

FINDING OF FACT NO. 8:That July 3, 1991, is the earliest date on which claimant could have known or could have been informed by a doctor that the problem with his legs was caused by an injury to his back which was job related.

FINDING OF FACT NO. 9:That on July 24, 1991, claimant was informed by [Dr. S] that he had three herniated discs.

In view of this remand, we do not reach the correctness of the hearing officer's determination that the respondent is entitled to benefits under the 1989 Act. However, we reverse his determination that notice was timely given, as such determination appears to have been based upon a misapprehension of the law (to wit, application of occupational disease notice standards to a discreet injury), and remand for further consideration and application of the correct statutory provisions to arrive at his decision in this case.

[1] Art. 8308-1.03(27) defines injury, in pertinent part to mean "damage or harm to the physical structure of the body..."

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge